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No. 96-9 (4)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ARKOMA PRODUCTION COMPANY, ARKLA, INC. and ARKLA EXPLORATION COMPANY,

Conditional Cross-Petitioners,

vs.

BOB KLEIN AND GENEVIEVE KLEIN, JOHN FRANK PENDERGRASS, SAM THOMPSON, MARGARET SCHAFFER, CLYMER LAW, DONNIE HALL, *et al.*,

Respondents and Cross-Respondents.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CONDITIONAL CROSS-PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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In their Brief in Opposition in this matter, the original Petitioners (case no. 95-1924), Jerral W. Jones and Michael V. McCoy, acknowledge that the court of appeals' statute of limitations ruling in *Klein I* was erroneous. Brief in Opposition 2. Nevertheless, Jones and McCoy assert the erroneous decision is not sufficiently egregious as to warrant the grant of a petition for certiorari. *Id.* 3. Conditional Cross-Petitioners reply that the court of appeals' departure from the accepted course of judicial proceedings in usurping the district court's role as fact finder in this instance is of the precise nature which led this Court to the grant of certiorari in *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809 (1986). The Eighth Circuit in *Klein I* did not mention Federal Rules of Civil Procedure Rule 52(a), did not explicitly apply the clearly-erroneous standard to the district court's express findings and offered no explanation for any finding, if the Eighth Circuit was of that view, as to why the district court's express findings on the time bar were clearly erroneous. *Id.* at 475 U.S. 811. Just as certiorari was granted in *Dennison*, this Court should exercise its supervisory power here. Inasmuch as Jones and McCoy rely on the *Dennison* decision to support correction of the procedural error visited on them (case no. 95-1924 Petition 3 and Brief in Opposition 3), Conditional Cross-Petitioners fail to see the logic of the assertion by Jones and McCoy that the recognized error of the court of appeals should not be corrected in this case. The Constitution's mandate of due process has not been deleted in the intervening time interval.

Royalty owner Respondents make no effort to find correctness in the court of appeals' decision on the time bar issue.[1] Indeed, there can be no justification for the extraordinary

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1. At page 4 of their Brief in Opposition, Respondents do assert an argument not discussed by the court of appeals in *Klein I*. Respondents' argument that monies were paid as a result of the December 31, 1986 agreements at times within the applicable three year time bar avail

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procedure of reversing express findings of facts on the controlling statute of limitation without expressing an effort to comport to the appellate court's role of reviewing findings of fact pursuant to the clearly-erroneous standard of Rule 52(a).

Instead, the royalty owner Respondents assert that the law of the case doctrine should perpetuate the error of the court of appeals.[2] Brief in Opposition 3-5. The assertion is resolved against the Respondents by clear precedent from this Court. As stated by this Court in *Christianson v. Colt Industries*, 486 U.S. 800, 817 (1988):

> [L]aw of the case cannot bind this Court in reviewing decisions below. A petition for writ of certiorari can expose the entire case to review.... Just as a district court's adherence to law of the case cannot insulate

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Respondents nothing. The marketing decision complained of was made and consummated by February 13, 1987, more than three years prior to the filing of Respondents' complaint below. *Klein I*, Pet. App. 104a.

2. Additionally, Respondents refer to two other issues. In their Brief in Opposition 2-3, it is argued that Conditional Cross-Petitioners are not "respondents" within the meaning of the Supreme Court Rules. Respondents' argument fails under the very wording of Rule 12. Rule 12.6 expressly provides that "[a]ll parties other than the petitioner are considered respondents...."

Further, Respondents contend the conditional cross petition should be rejected due to the Conditional Cross Petitioners' citation of the 5th Amendment to the United States Constitution. Brief in Opposition 5. It is the due process clause of the Constitution which illuminates the extraordinary, procedural error of the court of appeals. This is no new issue not previously raised. The same error of failing to comport to the appellate court's role under Rule 52(a) was raised below and now is the basis for the requested relief.

> an issue from appellate review, a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review.

See also, Lujan v. National Wildlife Federation, 497 U.S. 871, 881, n. 1 (1990).

Even a review of the authorities cited by Respondents reflects that the law of the case doctrine does not preclude a review of lower court decisions by the Supreme Court and does not preclude review of any decision which is clearly erroneous and which would work a manifest injustice. *Arizona v. California*, 460 U.S. 605, 618, n. 8 (1983) (cited by Respondents at Brief in Opposition 4); 5 Am. Jur. 2d *Appellate Review*, §§ 605-06 (cited at Brief in Opposition 3).

CONCLUSION

Conditional Cross-Petitioners' request for a writ of certiorari should be granted.

Respectfully submitted,

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